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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 46

LEE CASSELL, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

BRIEF FOR THE STATE OF TEXAS, RESPONDENT

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BRIEF FOR THE STATE OF TEXAS, RESPONDENT

PRELIMINARY STATEMENT

Petitioner Lee Cassell, a Negro, was indicted and tried for murder in the Criminal District Court for Dallas County, Texas. He was found guilty and the death penalty was recommended by the jury after the introduction of evidence which Petitioner admits is sufficient to sustain the verdict.[1] A motion to quash

[1]Petition For Writ of Certiorari and Brief in Support Thereof, p. 8. Because this appeal is in *forma pauperis*, and in the interest of brevity, the portion of the Trial Court's record and of the opinion of the Texas Court of Criminal Appeals dealing with the facts of the crime involved were omitted. Petitioner was found guilty of crushing the skull of a sleeping watchman with a piece of pipe in order to carry out a burglary. The facts are set out in the opinion, *Cassell v. State*, 216 S. W. 2d. 813 (1949, not yet officially reported).

the indictment, on the ground that he had been denied the equal protection of the laws in the selection of the grand jury in that no Negroes were selected to serve on the grand jury which indicted him, was presented by Petitioner (R. 1-3) and controverted by the State of Texas (R. 4-5). The motion to quash does not allege that Negroes had been intentionally and systematically excluded over any period of time. The complaint is only that no Negro was selected for *this particular grand jury.*[2] It is not controverted that the grand jury in question was selected and had been in general operation several weeks before this Petitioner was indicted. After presentation of evidence by both Petitioner and the State, Petitioner's motion to quash the indictment was overruled.

Appeal was taken to the Texas Court of Criminal Appeals, the Court of last resort in criminal matters. That Court affirmed the conviction and the action of the Trial Court in overruling the motion to quash the

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[2]This point in the motion to quash reads: "That defendant is a negro and is charged with the murder of Lester Linwood Wilson, a white man; that no negroes were placed on the Grand Jury which indicted him, and that there are and were from five thousand to ten thousand adult male negroes, resident citizens of Dallas County, Texas, who are and were qualified jurors, and who were qualified to sit as Grand Jurors, being about one-seventh of the jury population of Dallas County, Texas; that the jury commissioners appointed by the court were all white men; that in selecting the grand jury they drew no negroes on said grand jury, and in this connection they discriminated against them in the formation of said grand jury, and thus denied him the equal protection of the law, which is guaranteed him under the Fourteenth Amendment to the Constitution of the United States and the decisions thereunder." (R 3.) The motion to quash is addressed to the "equal protection" clause. Want of "due process" was not raised.

indictment.[2] After analyzing the evidence presented upon the hearing and the motion to quash in the Court below, it wrote:

> "Believing that appellant has failed to show race discrimination in the organization of the grand jury, as alleged, his motion for rehearing is overruled." (R. 31-33.)

After granting leave to Petitioner to proceed in *forma pauperis* (R. 33), this Court granted the petition for certiorari (R. 34). The single point raised by the petition for certiorari is that Petitioner's conviction is void because "of race discrimination in the selection of the grand jury which indicted him."[4]

STATEMENT OF THE CASE

The history of the selection of grand juries in Texas, and particularly in Dallas County, involves several decisions by this Court. The method of selection of grand jurors, as provided by the Constitution and statutes of Texas,[5] has recently been reviewed

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[2]R. 29-33; *Cassell v. State*, 216 S. W. 2d 813 (1949, not yet officially reported).

[4]Petition For a Writ of Certiorari and Brief In Support Thereof, p. 3.

[5]Section 13, Article V of the Constitution of Texas provides that a grand jury shall be composed of twelve men.

Section 19, Article XVI of the Constitution of Texas provides that the Legislature shall prescribe by law the qualifications of grand jurors.

Article 333 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that the District Judge shall appoint three jury commissioners.

Article 335 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that said grand jury commission-

by this Court and its validity has been accepted.* Petitioner does not now attack the validity of this method of selection.

This historical background is reflected from the record in this case. Henry King, Judge, Criminal District Court No. 2, Dallas County, Texas, who impanelled the grand jury which indicted Petitioner, testified:

> "I tried and I am familiar with the case of Hill v. The State, which went up from Dallas County around 1942, on the question of negroes not being on Grand Juries." (R. 16.)

The case of *Hill v. The State* referred to by the witness is *Hill v. State of Texas*, 316 U. S. 400

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ers shall appear before the Judge and take an oath that they will not knowingly select a grand juror whom they believe to be unfit or not qualified.

Article 336 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that at the time the jury commissioners are sworn in by the Judge he shall instruct them as to their duties.

Article 338 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that the jury commissioners shall select sixteen men from different portions of the county to be summoned as grand jurors for the next term of court.

Article 339 of the Texas Code of Criminal Procedure (Vernon, 1948) provides that a grand juror must have certain qualifications.

Article 340 of the Texas Code of Criminal Procedure (Vernon, 1948) requires that the list of names selected to serve as grand jurors be sealed in an envelope.

Article 344 of the Texas Code of Criminal Procedure (Vernon, 1948) requires the District Clerk to open said envelope thirty days before court meets and make a copy of the grand jury and deliver it to the Sheriff.

These constitutional and statutory provisions are set out in Appendix at page 46.

Akins v. Texas, 325 U. S. 398 (1945).

(1942), in which this Court reversed a conviction by a Trial Court in Dallas County, Texas, on the ground of systematic exclusion of Negroes from the grand jury because of their race. Judge King testified in this case that:

> "Prior and subsequent to the handing down of the opinion the Hill Case, when I was charging Grand Juries I would tell them that there should not be any discrimination made on account of race, creed or color, or religion, and I particularly instructed them about the Hill Case. As a matter of fact, I explained the Hill Case to them and told them about it." (R. 17.)

> "I have always told them what the Constitution says with reference to discrimination against a person because of race, politics, religion or color. It is not my duty to tell them to put them on or not to put them on." (R. 18.)

The *Hill* case was decided by this Court on June 1, 1942. The Trial Court in Dallas County has four terms a year—January, April, July, and October. There was a Negro on the next grand jury to be impanelled after the *Hill* case was decided (R. 16-17).

The record shows that a Negro served on the grand jury for the October Term, 1942, and the January Term, 1943 (R. 18, 22, 24). During this latter term an indictment for murder was returned against L. C. Akins, a Negro, and he was convicted and sentenced to death. This judgment was affirmed by the Court of Criminal Appeals and certiorari was granted by this Court. The petition in that case was based upon a claim of discrimination against the Petitioner

because of his race in the selection of the grand jury which returned the indictment.[1] This Court sustained the conviction and affirmed the judgment. *Akins v. Texas*, 325 U. S. 398 (1945). In that case the Court stated:

> "The history and record of this case gives evidence that the courts of Texas which are charged with the trial of petitioner endeavored to comply with the federal constitutional requirements as to the selection of grand juries, according to the interpretation of this Court in Hill v. Texas, supra. Not only did the Court of Criminal Appeals reverse a former conviction of petitioner on its authority but the judge, now deceased, of the criminal district court of Dallas instructed the three jury commissioners, who selected this grand jury list, as testified to by each of them, that there should be no discrimination against anyone because of his color."

Subsequent to the January 1943 grand jury which was attacked and upheld in the *Akins* case, there was at least one Negro on the grand jury in Dallas County, Texas, for the April and July Terms, 1943; the January, April, July, and October Terms, 1944; the January, April, July, and October Terms, 1945; the January, July, and October Terms, 1946;[2]

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[1] Brief of Petitioner Under His Petition For a Writ of Certiorari, pp. 4-5, *Akins v. Texas*, *supra*.

[2] The Texas Court of Criminal Appeals is in error in its opinion in stating that no Negro served on the October 1946 Grand Jury. One James Dixon is identified as being colored and as having served by the Witness Sweatt (R. 19). Witness Burden also testified that Dixon served on the October 1946 Grand Jury. (R. 23.)

and the January and July Terms, 1947. (R. 14, 15, 18-19, 22-23, 24). Thus with three exceptions there has been at least one Negro upon each grand jury which has been impanelled in Dallas County, Texas, since the decision by this Court in the *Hill* case in 1942, prior to the grand jury which returned the indictment against the Petitioner. The record does not reflect how many Negroes were summoned for grand jury service and not impanelled on the grand jury nor those who were summoned and excused by the Court.

Turning then to the facts surrounding the selection of the particular grand jury which indicted the Petitioner. The Trial Judge gave instructions to the Grand Jury Commissioners who selected the October Term, 1947, grand jury that there should be no discrimination made on account of race, creed, color, or religion. He testified that, "I particularly instructed them about the *Hill* case. As a matter of fact I explained the *Hill* case and told them about it." (R. 17). Each Commissioner stated that the instructions of the Trial Judge to the effect that there was to be no discrimination because of race, color or creed had been followed.* With these instructions before

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*Commissioner Chandler: "When I was called down to serve as Grand Jury Commissioner, I was instructed by Judge King that there was no racial discrimination, not that a negro could or couldn't be selected for the Grand Jury. The Judge did not tell us that we were to discriminate against Negroes or Mexicans or any other race; the Judge did not instruct us to put negroes on or leave them off." (R. 6.)

Commissioner Moser: "My duties were to select 12 men and several alternates to serve, and we were given instructions by Judge King not to discriminate in any way against

them the jury commissioners proceeded to select the members of the grand jury.

Commissioner Chandler testified:

> "During the course of our deliberations as Commissioners there was a conversation with reference to selecting negroes on the Grand Jury Panel; it was discussed in the jury room among we Commissioners that an effort had been made to secure a negro for the Grand Jury; there was an effort made by the other Grand Jury Commissioners. There had been several efforts made to secure negroes and this was discussed among the Members of the Commission." (R. 7.)

> "No studied or passive effort was made by that Grand Jury Commission to keep a negro from serving on the October Grand Jury." (R. 7.)

> "The reason I did not submit a negro's name was *not* because of his color, or race, or previous condition of servitude in any sense of the word." (R. 7.)

Commissioner Moser testified:

> "I know some negroes that might be qualified for Grand Jury Service. I selected a negro but

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any race, creed or anything of that kind, and that we were to select these men with an open mind." (R. 8.)

Commissioner McLain: "The Court pointed out to us what the qualifications were for the grand jury; he told us that we were not to discriminate because of any race, color, or creed; no element of race, color or creed entered into our selection; we were instructed not to favor any one or discriminate against anyone because of race color or creed." (R. 10.)

I could not get him for this service because he could not serve. I selected 6 reputable men but I did not select a negro." (R. 8.)

"I know negro yardmen, negro doctors, and principals of the negro High School; that is who I tried to get on the jury; I called up the Principal of the Lincoln High School in South Dallas and I asked him if he would serve on the Grand Jury; he said that he would be glad to but that his time belonged to the City Schools and I was to call his boss, Mr. W. T. White, Superintendent of Dallas Schools; I was unable to get Mr. White when I called him twice because they are very busy in October; finally through his Secretary I was told that he just could not spare his Principals during that time. The Principal of Lincoln High School, Melvin, is a negro. This was just about the beginning of the school year.

"There was absolutely no studied or passive effort to discriminate against negroes on this Grand Jury Panel; they took themselves off when we tried to put them on. The reason that a negro was not put on this Grand Jury Panel was not because I had not made an effort to secure one; that is the only reason, as far as I was concerned." (R. 8-9.)

"I know a lot of negroes that are qualified lawyers, doctors, Superintendents of Schools and that sort of thing, but the particular thing is that their occupation precludes their serving. You could not ask a doctor or lawyer to serve 3 months of their time, either white or colored; that limited us as to the number that we could select." (R. 9.)

Commissioner McLain testified:

"The court pointed out to us what the qualifications were for the Grand Jury, he told us to select men who met those qualifications; he told us that we were not to discriminate because of any race, color or creed; no element of race, color or creed entered into our selection; we were instructed not to favor any one or discriminate against any one because of race, color or creed. I know definitely and positively that we did not discriminate; we selected the Grand Jury on the basis of qualification and no other basis. I don't know whether there were any Jews or Catholics on that grand jury; I assume there were some Protestants . . . " (R. 10.)

"Mr. Moser tried to contact a negro over the telephone to get him to serve on Grand Jury; as far as I know Mr. Moser did not get the permission to submit the name of that man; I don't remember the negro's name but he was Principal of the Negro High School here. Mr. Moser put the negro's name in and he discussed his qualifications and said that he would recommend him, and Mr. Chandler and I agreed that we would be agreeable to join with him in his recommendation, if Mr. Moser could procure him."

"I found that some people who were qualified could not serve for various reasons; I had one man whose hearing wasn't so good; another man was going to leave town; It is necessary and advisable to get people not only qualified but who can serve. Some people that I approached said, they could not give one-half a day, 5 days a week for 3 months, so, it was necessary to get people that could serve."

"If the name of any qualified negro citizen—been submitted at that time, who had given his permission and said he had time to serve, I certainly would have submitted his name along with the other 15 names, if it was somebody that would have been acceptable to me. With reference to there being any studied or any obvious or intentional effort made by the Commissioners to keep a negro from serving on the Grand Jury, I will say that there was absolutely no such effort made." (R. 10-11.)

With regard to this testimony by the Jury Commissioners, the Court of Criminal Appeals stated:

"The jury commissioners, who drew the list of grand jurors from which the grand jury that returned the indictment against appellant, appear to have contacted members of the Negro race who they thought possessed the qualifications of grand jurors, with a view of having them serve on the grand jury, and refrained from placing them on the grand jury, at their request. While it is true the jury commissioners were not clothed with the authority to pass upon excuses of those eligible for grand jury service, yet it appears to us that this conduct on the part of the jury commissioners fortifies and supports them in their position that they did not discriminate against members of the Negro race in drawing the grand jury that returned the instant indictment.

"Believing that appellant has failed to show race discrimination in the organization of the grand jury, as alleged, his motion for rehearing is overruled." (216 S. W. 2d 813, 819.)

AUTHORITIES

A mixed jury in each case is not required by the equal protection clause of the Fourteenth Amendment. It requires only that there be no intentional and systematic exclusion of Negroes from grand jury service solely because of race. Systematic exclusion may be shown by a long-continued exclusion of Negroes from grand jury service. Under the decisions of this Court as applied to the facts in this case, there has been no such intentional and systematic exclusion.

The facts of this case can best be understood with reference to the Fourteenth Amendment by a brief review of the cases of a similar nature. An examination of the cases will show that the trial in this case was conscientiously carried out with particular emphasis on the decision of this Court. These prior cases will, therefore, be briefly set out. Emphasis is added throughout.

Cases Decided Soon After the War Between the States

Three cases were decided by this Court in 1879 which laid down basic principles. In *Strauder v. West Virginia*, 100 U.S. 303 (1879) the State's statute provided that no Negro was eligible to be a member of the grand or petit jury. The statute was held to constitute State action and to deny the Negro defendant the equal protection of the laws as required by the Fourteenth Amendment. It was declared to be unconstitutional. The opinion further stated, however,

> "It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, *all persons* of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury."[10]

Immediately following the *Strauder* case is *Virginia v. Rives*, 100 U.S. 313 (1879). Negroes indicted in a State Court sought removal to the Federal Court because there were no Negroes on the grand jury which indicted them or on the petit jury which had been summoned to try them. They contended that based on their relative population they were entitled to a jury composed one-third of Negroes. This Court held that the case was not removable since the statute did not exclude Negroes from jury service. This Court could not presume that the Negroes would not receive equal protection of the laws in the State Court. The Court held that there could be no discrimination in the selection of jurors based solely on race. The opinion states, at page 323:

> ". . . But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz., a right to have the jury composed in part of colored men. A

[10]The *Strauder* case was followed in *Bush v. Kentucky*, 107 U. S. 110 (1882) where the grand jury indicting the Negro was selected under a statute which limited membership on the grand jury to white men.

mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment, or within the purview of sect. 641."

Following these cases was *Ex Parte Virginia*, 100 U.S. 339 (1879). A State Court Judge was arrested for impounding a jury upon which there were no Negroes in violation of an Act of Congress. His application for habeas corpus was denied by this Court.

In *Neal v. Delaware*, 103 U.S. 370 (1880), the facts showed that Negroes had always been excluded from grand and petit jury service. Those facts were held to raise a violent presumption that the State had been and was practicing discrimination. They presented a *prima facie* case which the State, having introduced no evidence, did not overcome. In reversing the case the Court summarized the holdings of the previous cases:

". . . while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' "

Later Cases Where No Negro Served on Grand Jury Over a Long Period of Time

Following the above cases there are several opinions by this Court cited by Petitioner, where the facts showed that for a very long period of time no Negro, or extremely few Negroes, served on grand juries in criminal cases involving life, liberty, or property of Negro citizens. Where the point was properly raised and supported by proof, the cases were reversed.[11] They are to be briefly alluded to to show the continuity of the decisions, and to emphasize their distinction from the facts of the cause under consideration.

Carter v. Texas, 177 U.S. 442 (1900). No Negro had ever served on the grand jury in Galveston County, Texas. The Trial Court refused to hear tendered evidence on the Negro's motion to quash the indictment.

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[11]There are cases of the same nature where a different result was reached. For example, in *Martin v. Texas*, 200 U.S. 316 (1906), the conviction of the Negro was affirmed where he introduced no proof to support his motion to quash for alleged discrimination. It cannot be presumed that State officers will not perform their duties; allegations and affidavits are not sufficient where discrimination is denied. To the same effect are *Smith v. Mississippi*, 162 U.S. 592 (1896); *Williams v. Mississippi*, 170 U. S. 213 (1898); *Tarrance v. Florida*, 188 U.S. 519 (1903); and *Franklin v. South Carolina*, 218 U.S. 161 (1910). And in *In Re Wood*, 140 U. S. 278 (1891), it was held that if a Negro did not raise the point before or during the trial, he could not raise it for the first time on writ of habeas corpus. Similarly, in *Gibson v. Mississippi*, 162 U.S. 565, 584 (1896) the conviction of a Negro was affirmed because there was no motion presented to quash the indictment.

Rogers v. Alabama, 192 U.S. 226 (1904). The State Court refused to consider the Negro's motion to quash or to hear evidence that no Negro had served on any jury in the county for 10 years. In reversing the case, this Court said:

> ". . . Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, *all persons* of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. . . ."

Norris v. Alabama, 294 U.S. 587 (1935). No Negro had served in that county within the memory of any of the witnesses (a generation or longer). The facts made a *prima facie* case of discrimination which the State did not rebut.

Hollins v. Oklahoma, 295 U.S. 394 (1935), is a *per curiam* opinion following *Neal v. Delaware* and *Norris v. Alabama, supra.*

Hale v. Kentucky, 303 U.S. 613 (1938). No Negro had served on the grand jury or petit jury in the county for 30 years. Reversed.

Pierre v. Louisiana, 306 U.S. 354 (1939). No Negro had ever been selected for grand jury service in that parish within the memory of any of the witnesses. Over a forty-year period, the names of only three Negroes, one of whom was then dead, had been listed for jury service. Only one Negro had ever

been called for jury service. The State offered no evidence to the contrary. This Court held that the testimony created a strong *prima facie* showing that Negroes had been systematically excluded because of race from grand jury service, and that the State failed to rebut the presumption.

There are two recent cases in this line of decisions:

Patton v. Mississippi, 332 U.S. 463 (1948). No Negro had served on the grand or petit criminal court juries in the county for thirty years or more. The Court, speaking through Mr. Justice Black, said:

> "We hold that the State wholly failed to meet the very strong evidence of purposeful racial discrimination made out by the petitioner upon the uncontradicted showing that for thirty years or more no Negro had served as a juror in the criminal courts of Lauderdale County. When a jury selection plan, whatever it is, operates in such way as always to result in the *complete and long-continued exclusion of any representative at all from a large group of negroes*, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand. . . ."

Brunson v. North Carolina, 333 U.S. 851 (1948). The actual facts of this case are not given in any opinion. This Court's opinion and the opinion of the Supreme Court of North Carolina, 227 N. C. 558, 43 S. E. 2d 82, are *Per Curiam*. But from the briefs filed in this Court in that case it appears that in a community composed 45 per cent of Negroes, only 12 of 4,087 persons who had served on juries in the county in the ten years preceding the trial were Negroes.

Some witnesses placed the number of Negroes as low as 4 for that ten-year period. No Negroes had served on the grand jury in the entire year in which Brunson was charged. Names of Negroes eligible for jury duty were kept on a separate list from the general list. It is clear that the facts in the *Brunson* case were different from *Koritz v. State*, its companion case, in which an opinion was written by the North Carolina Supreme Court. 227 N. C. 552, 43 S. E. 2d 77 (1947).[12]

The Texas Cases

The following are the Texas cases which have been decided by this Court. Their development will show that the Trial Court in the case at bar made a studied effort to follow the decisions of this Court.

As set out above, one of the early landmark cases is *Carter v. Texas*, 177 U.S. 442 (1900). This Court there held that the grand jury system as practiced in Galveston County was in violation of the equal protection clause of the Fourteenth Amendment. It was there shown that no Negro had ever served.

The next Texas case was *Martin v. Texas*, 200 U.S. 316 (1906). In that case the conviction of the Negro was upheld because no evidence was introduced to show discrimination. In the Trial Court

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[12]The North Carolina Court, *per curiam*, in the *Brunson* case simply wrote that the *Brunson* case was controlled by its ruling in *State v. Koritz*, 227 N. C. 558, 43 S. E. 2d 82. This Court in the *Brunson* case simply wrote *per curiam* (omitting citations): "Reversed." The citations given were to cases of proven discrimination against Negroes on grand juries.

the attorney for the Negro had moved to quash the indictment on the ground that there was no Negro on the grand jury in Tarrant County (Fort Worth), but he introduced no proof. It was held that his motion unsupported by evidence was insufficient. The Court stated that "whether such discrimination was practiced in this case could have been manifested only by proof overcoming the denial on the part of the State. . . ."

In *Thomas v. Texas*, 212 U.S. 278 (1909) a motion to quash the grand jury indictment was made because the grand jury was composed "almost exclusively of white persons, and having not to exceed one negro . . . upon said jury. . . ." One Negro did serve on the grand jury, but none served on the petit jury. This Court held, following *Martin v. Texas*, that discrimination cannot be established by merely proving that no one of defendant's race was on the jury. It held that an accused cannot demand a mixed jury, and that a mixed jury is not guaranteed by the Fourteenth Amendment to any race.

In affirming the judgment of conviction, this Court, through Mr. Chief Justice Fuller, said:

> "As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on

the record before us. On the contrary, the careful opinion of the Court of Criminal Appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit juries. Indeed, there was a negro juror on the grand jury which indicted plaintiff in error, and there were negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box. The court said:

" 'It may be that the jury commissioners did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit jurors in this case, still this would not be evidence of discrimination. *If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated.* We understand the rule to be that mere error in administering the criminal law of the State, or in the conduct of a criminal trial, no Federal right being invaded or denied, is beyond the revisory power of the Supreme Court of the United States under the Constitution and the statutes regulating its jurisdiction.' "

Smith v. Texas, 311 U.S. 128 (1940) was the next Texas case. It arose in Harris County (Houston). After *Martin v. Texas, supra*, the names of Negroes were included in those to be called for grand jury service. But from 1931 to 1938 only 5 of 384 grand jurors who *served* were Negroes; that of 512 persons *summoned*, only 18 were Negroes; that of the

18, the names of 13 appeared as the last names on the 16-man jury list, the custom being to select the 12-man grand jury in the order that the names appeared on the list; that of the 5 Negroes who served, the same one served three times so that only 3 individual Negroes ever served; that there was no Negro on any of the grand juries in 1937 and none in 1938 when the defendant was indicted. While recognizing that discrimination was a queston of fact, this Court decided that "chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes. . . . Nor could chance and accident have been responsible for the combination of circumstances under which a Negro's name, when listed at all, almost invariably appeared as number 16."

Hill v. Texas, from Dallas County (Dallas) was handed down shortly after *Smith v. Texas.* 316 U.S. 400 (1942). The evidence there showed that no Negro had served on a Dallas County grand jury for the sixteen years prior to Hill's indictment. Following *Smith v. Texas* and *Neal v. Delaware*, *supra*, the conviction was reversed.

Akins v. Texas

Before the holding of this Court in *Hill v. Texas* in 1942, Akens, a Negro, was indicted in Dallas County for murder. He made a motion to quash the indictment on grounds similar to those in the *Hill* case: that no Negro had ever been drawn and served on the grand jury in Dallas County. He received a sentence of life imprisonment. The case reached

the Texas Court of Criminal Appeals (the State's highest Court in criminal matters) after the decision in *Hill v. Texas*, 145 Tex. Crim. 289, 167 S. W. 2d 758 (1943). The Texas Court of Criminal Appeals reversed the *Akens* case because of this Court's opinion in *Hill v. Texas*. The Texas Court of Criminal Appeals wrote:

> "The main question presented herein is practically the same as was offered in the case of Hill v. State . . . which was reversed by the Supreme Court of the United States, . . . That court held that similar testimony evidenced a deliberate discrimination in the selection of grand jurors for many years upon the part of the judges of the district courts of Dallas County, and their jury commissioners for many years, and disregarding the testimony of such judges and commissioners such court reversed the cause, and virtually held the indictment therein to be void. . . ." 167 S. W. 2d at 759.

> ". . . Regardless of what our views may be, the Supreme Court of the Nation has said that the continued failure to find men of color whose characteristics are sufficiently strong to convince one that they are of grand jury calibre is an irrefutable evidence of discrimination against them because of their color alone. See the Hill case, supra. As in duty bound, we find ourselves in the position of ordering a reversal of this cause on account of what that court says is deliberate discrimination against appellant because of the color of his skin." 167 S. W. 2d at 760.

When the case was retried, Akins[13] received a death sentence. The judgment was affirmed by the Texas Court of Criminal Appeals. 148 Tex. Crim. 523, 182 S. W. 2d 723 (1944).

This Court reviewed the evidence of the second indictment and trial in detail in *Akins v. Texas*, 325 U.S. 398. It showed that one Negro did serve on the grand jury which indicted Akins. Akins contended, however, that it was error to limit the number of Negroes on the grand jury to one. In the interest of brevity that testimony will not be set out at length. But it is directly in point. An examination of the facts in the case at bar and of the *Akins* case will show that precisely the same procedure was followed in this case as was followed in the *Akins* case. In the *Akins* case the trial judge instructed the jury commissioners that there should be no discrimination against Negroes in the selection of a grand jury. The grand jury commissioners were familiar with this Court's rulings. One Negro was selected for the grand jury and he served. The commissioners testified that they intended to put one Negro on the grand jury.

The Trial Court overruled the motion to quash. The ruling carried the implied finding that no discrimination was in fact practiced. The Texas Court of Criminal Appeals found that no discrimination was shown. *Akins v. State*, 148 Tex. Crim. 523, 182 S. W. (2d) 723. As will be more fully discussed later, this Court recognized that whether there had been any discrimination or not was an issue of fact:

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[13]The spelling of *Akens* was changed to *Akins* in the official reports.

"... the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, ... we accord in that examination great respect to the conclusions of the state judiciary ... That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process,' ..., or equal protection." 352 U. S. 402.

This Court concluded:

"... As one member of the Negro race served upon the grand jury which indicted petitioner and one had appeared upon the other grand jury list which had been selected after the decision in Hill v. Texas, we cannot say that the omission from each of the two lists of all but one of the members of a race which composed some fifteen per cent of the population alone proved racial discrimination." 325 U. S. at 405.

"A careful examination of these statements in connection with all the other evidence leaves us unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list. The judge who heard the witnesses on the motion to quash

did not find that type of discrimination. The law of their state, the instructions of the judge, their oath of office required them to choose prospective jurors on their statutory qualifications and without regard to their color or the number of representatives of various races who might appear upon the list. We cannot say the commissioners violated these obligations." 325 U. S. at 407.

The holding of the *Akins* case has recently been affirmed in *Zimmerman v. Maryland*, 336 U. S. 901. (Jan. 1949). This Court simply wrote "The Judgment is affirmed. *Akins v. Texas*, 325 U. S. 398 (1945)." The opinion affirmed is reported in 59 A. 2d. 675 (1948).

A Mixed Jury in a Particular Case Is Not Essential to the Equal Protection of the Laws

Beginning with the very earliest cases after the War Between the States, it has been the uniform holding of this Court that a mixed jury in a particular case is not essential to the equal protection of the law and it is not guaranteed by the Fourteenth Amendment. Pertinent quotations from opinions of this Court are set out in the footnote in the interest of brevity.[14]

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[14] *Strauder v. West Virginia*, 100 U.S. 303, 305: ". . . The first of these questions is not whether a colored man . . . has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether . . . all persons of his race or color may be excluded by law, solely because of their race . . ."

Virginia v. Rives, 100 U.S. 313, 323: "A mixed jury in a particular case is not essential to the equal protection of the laws . . ." (Continued on page 26.)

This principle has been applied in many different fact situations. Thus in *Ruthenberg v. United States*, 245 U. S. 480 (1918) a Socialist on trial for draft evasion complained because the grand and petit juries were composed exclusively of members of other political parties. The contention was overruled.

On the same proposition, the special or "blue-ribbon" grand jury system of New York was upheld. *Fay v. New York*, 332 U. S. 261 (1947). The contention was there made by the defendant labor union

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Neal v. Delaware, 103 U.S. 370, 394: "We repeat what we said in that (*Virginia v. Rives*) case, that while a colored citizen . . . cannot claim . . . that his race shall have a representation on the jury, and while a mixed jury, in a particular case is not within the meaning of the Constitution, always or absolutely necessary . . ."

Bush v. Kentucky, 107 U. S. 110, 117: "It may have been true that only white citizens were selected and summoned, yet it would not necessarily follow that the officer had violated the law and the special instruction given by the court 'to proceed in his selection without regard to race, color, or previous condition of servitude.' There was no legal right in the accused to a jury composed in part of his own race. All that he could rightfully demand was a jury from which his race was not excluded *because of their color*. . . ."

Martin v. Texas, 200 U. S. 316, 320: "A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race, because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. . . ."

Snowden v. Hughes, 321 U. S. 1, 8: ". . . But a discriminatory purpose is not presumed . . .; there must be a showing of 'clear and intentional discrimination' . . . But a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race."

official that the selection of the grand jurors was unfairly narrowed against laborers.[15] Mr. Justice Jackson wrote at page 284:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and *in nearly all cases it has veen shown to have persisted over many years. Virginia v. Rives*, 100 U. S. 313, 322-23; *Martin v. Texas*, 200 U. S. 316, 320-21; *Thomas v. Texas*, 212 U. S. 278, 282; *Smith v. Texas*, 311 U. S. 128; *Hill v. Texas*, 316 U. S. 400; *Akins v. Texas*, supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. *Tarrance v. Florida*, 188 U. S. 519; *Martin v. Texas*, 200 U. S. 316; *Norris v. Alabama*, 294 U. S. 587; *Snowden v. Hughes*, 321 U. S. 1, 8-9; *Akins v. Texas*, 325 U. S. 398, 400."

The Court continued, page 291:

> "Even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. *Akins v. Texas*, 325 U. S. 398 . . . ."

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[15]Compare the earlier case of *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) where the evidence showed that "the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury list *all* persons who work for a daily wage." 328 U.S. at 221. The case involved a Federal Court jury and was reversed by a divided Court.

Moore v. New York, 333 U. S. 565 (1948) followed Fay v. New York, *supra*. The *Moore* case also involved the "blue-ribbon " jury. But a particular complaint was made to the fact that there was no Negro on the grand jury which indicted the defendant.

It was contended that Negroes were intentionally and systematically excluded. There were in fact no Negroes on the grand jury. There were no Negroes on the panel of 150 persons. The Court held that the fact that there was no Negro on the particular grand jury did not invalidate the indictment. The only question was whether there had been intentional and systematic exclusion of Negroes because of their race. The Court found there had been none.

This principle was followed in *Frazier v. United States*, 335 U. S. 497, 69 S. Ct. 201 (1948). In that case, in which a jury composed of Federal employees was upheld, this Court wrote "There is . . . no right to any particular composition or group representation on the jury."

This matter was discussed at length in *Akins v. Texas*, 325 U. S. 398 (1945) where the facts involved the Court from the same county as is involved in this case and where the system used was and is the same as was used in the *Akins* case. In that case Mr. Justice Reed wrote at page 403:

> ". . . Fairness in selection has never been held to require proportional representation of races upon a jury . . . Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible

individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds' . . . *Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized* . . . The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination . . ."

Whether Discrimination Was Practiced Is a Question of Fact. The Determination of the Issue by the State Court Is Controlling Unless the Decision Constitutes Such an Abuse as to Amount to an Infraction of the Federal Constitution

In *Thomas v. Texas*, 212 U. S. 278 (1909) a Negro's motion to quash his indictment for alleged discrimination was overruled after the introduction of evidence. His conviction was affirmed by the

Texas Appellate Court. In affirming the conviction, this Court wrote:

> "As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the Court of Criminal Appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors." 212 U. S. at 282.

The rule was recently re-announced by this Court in *Akins v. Texas*, 325 U. S. 398, at page 401:

> "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amend-

ment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect . . . we accord in that examination great respect to the conclusions of the state judiciary . . . That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process', . . . or equal protection . . . .

"The regular statutory practice for the selection of grand jurors was followed in this case. Under the Texas statutes jury commissioners appointed by the judge of the trial court select a list of sixteen grand-jurymen from which list twelve are chosen as a grand jury. Texas Code of Criminal Procedure, Articles 333, 337. Qualifications for grand-jurymen are set out in Article 339. The Commissioners are instructed by the court as to their duties. Art. 366. This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this Court. *Smith v. Texas*, 311 U. S. 128, 130. Petitioner does not attack it now. Its alternative would be a list composed of all eligibles within the trial court's jurisdiction and selection of the panel by lot.

". . . Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized . . . The mere fact of inequality in the number selected does not in itself show dis-

crimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such extent as to show intentional discrimination . . ."

". . . we cannot say that the omission from each of the two lists of all but one of the members of a race which composed some fifteen per cent of the population alone proved racial discrimination." 325 U. S. at 405.

". . . The judge who heard the witnesses on the motion to quash did not find that type of discrimination. The law of their state, the instructions of the judge, their oath of office required them to choose prospective jurors on their statutory qualifications and without regard to their color or the number of representatives of various races who might appear upon the list. We cannot say the commissioners violated these obligations." 325 U. S. at 407.

ARGUMENT

The authorities above demonstrate that it has been the uniform holding of this Court that the absence of a Negro from any particular grand jury (including the one in question) does not invalidate an indictment. A mixed jury in each case is not required by the Fourteenth Amendment. *Moore v. New York* and other cases cited, pages 25 to 29 herein. It is the system or manner of selection of grand juries, generally over a long period of time

that is locked to in order to determine whether there has been a denial of "equal protection."

Petitioner's motion to quash (set out in note 2 on page 2 hereof) makes the point only that no Negro was selected for the grand jury which indicted him. Such an allegation does not raise the Federal question and is insufficient to invalidate the indictment even if his allegations were taken as true.

But assuming that the point is raised that over a period of time there has been an intentional and systematic exclusion of Negroes from grand jury service in Dallas County solely because of their race, it is submitted that this case has been correctly decided.

The system for selection of grand juries used in this case was the same as it was when this Court considered and passed upon *Akins v. Texas*. The cause arose from the same county in Texas. Dallas County and its grand jury system was before this Court the first time in *Hill v. Texas*. Upon a finding of discriminatory practices in the *Hill* case, it was reversed. That was in 1942. Dallas County thereupon set out to carry out the mandate of this Court. As explained by this Court in the *Akins* opinion, Dallas County selects four grand juries a year, each serving for three months. The table below lists the Negroes who have actually served on the grand juries from the time of the *Hill* case down to and including the indictment of Petitioner. The figures on those *called* for service are not available. Also interpolated are the dates on the cases reaching this Court:

June 1. 1942	*Hill v. Texas* decided by this Court
October, 1942 Grand Jury	John King (R. 22, 24, 25)
January, 1943 Grand Jury	Charles D. Johnson (R. 14, 18, 22, 24, 25)
February 5, 1943	L. C. Akins indicted for murder
April, 1943 Grand Jury	W. J. Sheppard (R. 18, 22, 24, 25)
July, 1943 Grand Jury	T. W. Pratt (R. 14, 18, 22, 24, 25)
October, 1943 Grand Jury	None
January, 1944 Grand Jury	C. A. Walton (R. 14, 18, 22, 24, 25)
April, 1944 Grand Jury	Bonnie Johnson (R. 18, 22, 24, 25)
July, 1944 Grand Jury	William McShann (R. 14, 18, 22, 24, 25)
October 1944 Grand Jury	Vernie Flowers (R. 18, 22, 24, 26)
January, 1945 Grand Jury	LaFayette M. Turley (R. 14, 18, 22, 24, 26)
April, 1945 Grand Jury	Milton Grace (R. 18, 22, 24, 26)
June 4, 1945	*Akins v. Texas* decided by this Court
July, 1945 Grand Jury	W. Barton Beatty, Jr. (R. 14, 18, 22, 24, 26)
October, 1945 Grand Jury	Clarence F. Starks (R. 14, 18, 22, 24, 26)
January, 1946 Grand Jury	Wheeler Hardaway (R. 18, 22, 24)
April, 1946 Grand Jury	None
July, 1946 Grand Jury	Joe Dedies (R. 14, 19, 22, 24)
October, 1946 Grand Jury[16]	James Dixon (R. 19, 23)
January, 1947 Grand Jury	Travis Clark (R. 14, 18, 21, 23)
April, 1947 Grand Jury	None
July, 1947 Grand Jury	Sam Hudson, Jr. (R. 14, 21, 23)
October, 1947 Grand Jury	None
November 18, 1947	Lee Cassell indicted

[16]See Note 8 *supra* page 6.

And it will be remembered that a Negro was contacted for service on the October, 1947 grand jury. He did not serve because his employer could not dispense with his services for the four months' period. (R. 9.)

STATISTICS

Petitioner on pages 7 and 8 of his brief sets out a group of statistics. This Court, through its opinions, has indicated an interest in statistics showing the ratio of the white and Negro population and the proportional representation on grand juries. Current statistics are not available because the last Federal Census was taken in 1940. But it is believed that the following statistics demonstrate that there has been no intentional and systematic exclusion of Negroes from grand jury service because of their race.

The qualifications for service on grand juries are: (1) compliance with the requirements for voting;[17] (2) some manner of property holding; (3) a sound mind and good moral character; (4) ability to read and write; (5) the absence of a conviction of a

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[17]Article 339 (1) of the Texas Code of Criminal Procedure (Vernon, 1948), Appendix page 48 provides that in order for a citizen to serve as a grand juror he must be "qualified under the Constitution and laws to vote in said County." A poll tax is required in Texas as a qualification for voting. Texas Constitution, Art. VI, Sec. 2; Texas Civil Statutes (Vernon, 1948), Art. 2955. A constitutional amendment to abolish the poll tax as a prerequisite of voting will be submitted to Texas voters on November 8, 1949. S.J.R. 4, General Laws of Texas, 1949, pages i, ix.

felony; and (6) no legal accusation for theft or any felony.[18] Only men are eligible for such service.[19] The number of persons in any one group who possess certain of these qualifications is susceptible of proof or approximation by the use of available statistics.

In 1940[20] the total population of Dallas County was 398, 564. Of that total, 336,851 were white and 61,605 were Negroes. So approximately 15.5 per cent of the total population of Dallas County were Negroes according to the last census. But only approximately 7.44 per cent of those are male. The total male population was 191,453, or 48 per cent, and the female population was 207,111, or 52 per cent. The testimony of the Secretary of the Progressive Voters' League is to the effect that "there are some 5,500 colored Poll Tax payers in Dallas County." (R. 13). The approximate number of male holders of poll tax receipts would be 48 per cent of this number, or 2,640. The total number of poll tax receipts issued in Dallas County during 1946, these receipts to be used for election purposes during 1947, was 83,667. [21] Although there is no official

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[18]Texas Code of Criminal Procedure (Vernon, 1948), Article 339, Appendix page 48.

[19]Women may not serve upon either grand or petit juries in Texas. Texas Constitution, Art. 3, Sec. 13; Tex. Code Crim. Proc. (Vernon, 1948) Arts. 338, 349; *Harper v. State*, 90 Tex. Crim. 252, 234 S. W. 909 (1921). A constitutional amendment to remove this disqualification will be voted on by Texans at an election on Nov. 8, 1949, S.J.R. 2, General Laws of Texas, 1949, pages i, ix.

[20]Sixteenth Census of the United States: 1940, Population, Vol. II, Characteristics Of The Population, Part 6; Pennsylvania-Texas (U.S. Department of Commerce) pp. 795, 819. All figures used are taken from this source unless otherwise indicated.

[21]Texas Alamanac—1947-1948, pp. 420-422.

breakdown of the figure between males and females, 48 per cent of this latter number including all races would be 40,160. So the approximate total male holders of poll tax receipts was 40,160. Thus, assuming the same proportion among the races in the number of illiterates, the number of disqualifications because of indictment or conviction of crime, and in the percentage of householders or freeholders, 6.57 per cent of the persons eligible for grand jury service were Negroes, (there being 40,160 male poll tax holders of which 2,640 were Negroes).

This record shows that there were at least 17 Negroes who served on the last 21 grand juries in Dallas County (R. 14, 15, 18, 22-23, 25). They are listed on a page 34 hereof. Thus Negroes constituted 6.74 per cent of all the persons who have served on the grand juries in Dallas County since this Court decided the *Hill* case, including the grand jury which indicted Petitioner. So on the basis of the first qualification for service as a grand juror in Texas, the Negro citizens in Dallas County are represented in a percentage greater than (6.74) than the percentage of those eligible to serve (6.57).

Though current statistics are not available, the information available tends to demonstrate that a larger percentage of Negroes are otherwise disqualified under the remaining qualifications: (2) freeholder or householder;[22] (4) literacy;[23] and (5)

[22]Article 339 (2) of the Texas Code of Criminal Procedure (Vernon, 1948), Appendix page 48, provides that a prospective grand juror "must be a freeholder within the State or a householder within the county."

[23]Article 339 (4) of the Texas Code of Criminal Procedure (Vernon, 1948), Appendix page 48 provides that a prospective grand juror "must be able to read and write."

criminal records.[24] The statistics would materially reduce the 6.57 per cent of the Negroes eligible for service.

(1) The 1940 census shows that of 44,604 owner-occupied dwellings in Dallas County, the breakdown is 51,051 are white and 3,542 are Negro.[25] This reflects that many of those Negroes eligible as qualified voters would be ineligible because of the property requirement.

(2) On the basis of the 1930 census (the latest available count) this Court has stated in the *Hill* case that "7.5 per cent of the Negro population of the county" are illiterate.[26] This census also reveals that only .08 per cent of the white race, both native and foreign born, in Dallas County are illiterate.[27]

(3) Though Negroes compose only approximately 15.5 per cent of the Dallas County population, 28 per cent of those arrested were Negroes.[28] Thus it might be inferred that there are a large number of persons of the Negro race disqualified because of criminal records.[29] The records of the Federal Bureau of In-

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[24]Article 339(5) and (6) of the Texas Code of Criminal Procedure (Vernon, 1948), Appendix page 48 provide that a prospective grand juror "must not have been convicted of any felony," and "must not be under indictment or other legal accusation for theft or of any felony."

[25]Sixteenth Census of the United States: 1940, Housing, Vol. II, General Characteristics, Part 5, Rhode Island-Wyoming (U.S. Department of Commerce) p. 320.

[26]*Hill v. Texas*, 316 U.S. 400, 403 (1942).

[27]Population Bulletin, Second Series, Texas, Composition and Characteristics of the Population, 15th Census. (U.S. Department of Commerce.)

[28]Based upon number of arrests in Dallas County for the last nine months of 1948. Statistics secured from the Texas Department of Public Safety, Bureau of Identification.

[29]*Ibid*, Note 24.

vestigation show 5,398 felony offenses in Dallas, Texas, in 1947 and 4,886 in 1948.[30] Assuming that 28 per cent of the offenders were Negroes, 1,511 Negroes were disqualified from grand jury service in 1947 and 1,368 in 1948.

Thus it can be seen that though Negro men constitute 7.44 per cent of the total population of Dallas County they are a much smaller percentage of that section of the population which is available for grand jury service. On the basis of the available statistics Negroes are represented on the Dallas County grand juries in a proportion greater than the proportional amount of Negroes among those qualified.

"Intentional" Exclusion

This Court has held that the exclusion in question must be "intentional and systematic."[31] The

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[30]Uniform Crime Reports for the United States and its Possessions, Vol. XVIII, No. 2, Annual Bulletin, 1947, p. 98; Vol. XIX, No. 2, 1948, p. 97.

[31]"A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins v. Texas*, 325 U.S. 398, 403. Opinions of this Court use a variety of tests: "Intentional and systematic" is used in *Moore v. New York*, 333 U. S. 565, 568. "Systematic and intentional" was used by Mr. Justice Murphy in several opinions and dissents, e. g. *Thiel v. Southern Pacific*, 328 U.S. 217, 220; *Fay v. New York*, 328 U.S. 261, 297; *Moore v. New York, supra* at 570. "Purposefully and completely" is used in *Fay v. New York, supra* at 282. "Deliberately and systematically" is used in *Pierre v. Louisiana*, 306 U.S. 354, 357. "Purposefully" or "Purposeful" is used in *Akins v. Texas, supra*, at 403, and in *Snowden v. Hughes*, 321 U. S. 1 at 9. It is also "arbitrary and purposeful" in *Akins v. Texas, supra*, at 400,. and "systematic and arbitrary" in *Hale v. Kentucky*, 303 U. S. 613, 616.

question of intent or the purpose to discriminate is therefore material. The State introduced the testimony of the Trial Court and the three jury commissioners in this regard. If the Trial Court had an "intent" it was to follow the directions of this Court. After explaining that he had tried and was familiar with the *Hill* case (R. 16), he testified:

> "Prior and subsequent to the handing down of the opinion in the Hill Case, when I was charging Grand Juries I would tell them that there should not be any discrimination made on account of race, creed or color, or religion, and I particularly instructed them about the Hill case. As a matter of fact, I explained the Hill Case to them and told them about it.
>
> "I gave instructions to the Grand Jury Commissioners that selected the October Term, 1947, Grand Jury that indicted this Defendant, both individually and collectively, with reference to negroes serving on that Grand Jury." (R. 17.)

> ". . . The Commission did not fail to put a negro on that Grand Jury after my specific instructions; I never have instructed any Grand Jury Commission to put any negro on a Grand Jury, or a Catholic, or any religion, or a person of any nationality, even though they were American citizens; I have never instructed them to put anybody on there any more than never to tell them to put 'John Doe' on there; but I have told them what the case held in the Hill Case; I have always told them what the Constitution says with reference to discrimination against a person because of race, politics, religion or color. It is not my duty to tell them to put them on or not to put them on." (R. 17, 18.)

In a like manner, the jury commissioners testified that they did not discriminate against Negroes, intentionally or otherwise. Commissioner Moser testified:

". . . I know many people in Dallas of all races, creeds and colors, etc.

"On or about October 1st, 1947, I was called and I came to this court room to serve as a Grand Jury Commissioner to select a Grand Jury for the October, 1947, Term. My duties were to select 12 men and several alternates to serve, and we were given instructions by Judge King not to discriminate in any way against any race, creed or anything of that kind, and that we were to select these men with an open mind. That is what I did. . . .

"I know some negroes that might be qualified for Grand Jury Service. I selected a negro but I could not get him for this service because he could not serve. . . .

"Judge King told us when we were called down here that we should consider negroes as well as anybody else. He told us at least 3 times that we were not to be prejudiced against negroes and he said that it was not our duty to put a negro on, that he was not telling us that we had to and that it was up to us entirely; that applies to Mexicans and Italians as well.

"I know negro yardmen, negro doctors, and principals of the negro High School; that is who I tried to get on the jury; I called up the Principal of the Lincoln High School in South Dallas and I asked him if he would serve on the Grand Jury; he said that he would be glad to but that his time belonged to the City Schools and I was to call his boss, Mr. W. T. White, Superintendent of Dallas Schools; I was unable

to get Mr. White when I called him twice because they are very busy in October; finally through his Secretary I was told that he just could not spare his Principals during that time. The Principal of Lincoln High School, Melvin, is a negro. This was just about the beginning of the school year.

"There was absolutely no studied or passive effort to discriminate against negroes on this Grand Jury Panel; they took themselves off when we tried to put them on. The reason that a negro was not put on this Grand Jury Panel was not because I had not made an effort to secure one; that is the only reason, as far as I was concerned." (R. 7, 8, 9.)

Commissioner McLain testified:

"I know many people in Dallas that are qualified voters among all races and creeds. . . .

"The Court pointed out to us what the qualifications were for the Grand Jury, he told us to select men who met those qualifications; he told us that we were not to discriminate because of any race, color or creed; no element of race, color or creed entered into our selection; we were instructed not to favor any one or discriminate against any one because of race, color or creed. *I know definitely and positively that we did not discriminate;* we selected the Grand Jury on the basis of qualification and on no other basis. I don't know whether there were any Jews and Catholics on that Grand Jury; I assume that there were some Protestants because I know some of them."

"Mr. Moser tried to contact a negro over the telephone to get him to serve on Grand Jury; . . . Mr. Moser put this negro's name in and

he discussed his qualifications and said that he would recommend him, and Mr. Chandler and I agreed that we would be agreeable to join with him in his recommendation, if Mr. Moser could procure him.

". . . With reference to there being any studied or obvious or intention—effort made by the Commissioners to keep a negro from serving on the Grand Jury, I will say that there was absolutely no such effort made." (R. 10, 11.)

Commissioner Chandler testified:

"When I was called down to serve as Grand Jury Commissioner, I was instructed by Judge King that there was no racial discrimination, not that a negro could or couldn't be selected for the Grand Jury. The Judge did not tell us that we were to discriminate against negroes or Mexicans or any other race; the Judge did not instruct us to put negroes on or leave them off. Myself and the other 2 Commissioners were instructed to select 16 qualified men without reference to race or color or any other question like that.

". . . There had been several efforts made to secure negroes and this was discussed among the Members of the Commission. . . .

"No studied or passive effort was made by that Grand Jury Commission to keep a negro from serving on the October Grand Jury. . . ." (R. 6, 7.)

This testimony, some of it repeated because of its importance, indicates the complete lack of any intent to exclude or discriminate against Negroes in the

selection of the grand jury for the October Term, 1947. On the contrary, each of those charged with the duty of selection stated that he fulfilled his duties without any reference to race or color. The absence of intent to discriminate removes this case from any of the principles upon which this court has reversed cases involving discrimination in the selection of grand juries.[32]

Any inference of systematic exclusion over an extended period of time is dispelled by the fact that Negroes have served on 17 of the last 21 grand juries in Dallas County and that one was contacted in this case.

In overruling Petitioner's motion to quash the indictment in this cause, the Trial Court, after hearing all the witnesses presented, found that there was no discrimination practiced in the selection of the grand jury. The evidence and the opinions of this Court were carefully reviewed by the Texas Court of Criminal Appeals, both in its original opinion and on motion for rehearing, and the ruling of the Trial Court was affirmed. This Court has said that in examining the evidence to determine if a Federal Constitutional right has been denied, great respect will be accorded to the conclusions of the State judiciary. Cases cited pages 29 to 32 herein.

This record, it is submitted, shows no practice with regard to the selection of grand juries in Dallas County other than that of a conscientious effort by the authorities charged with the duty of organizing and impanelling grand juries to comply with the law as announced by this Court.

[32] *Ibid*, Note 31.

The facts and law of this case rest squarely on the *Akins* opinion of this Court. As written in *Moore v. New York:*

> ". . . not only is the record wanting in proof of intentional and systematic exclusion—the only witness sworn testified that there was no such practice or intent." 333 U. S. 565, 568.

CONCLUSION

It is respectfully submitted that this case should be affirmed.

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Dated November 3, 1949.

APPENDIX

Constitutional and Statutory Provisions of Texas Providing the Method for the Selection of Grand Juries

Constitutional Provisions

Article V Section 13: "Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

Article XVI Section 19: "The Legislature shall prescribe by law the qualification of grand and petit jurors."

Statutory Provisions[1]

Article 333: "The district judge shall, at each term of the district court, appoint three persons to perform the duties of jury commissioners, who shall possess the following qualifications:

[1]Texas Code of Criminal Procedure (Vernon, 1948).

1. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said court which requires the intervention of a jury."

Article 335: "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged.' "

Article 336: "The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county."

Article 338: "The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court."

Article 339: "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 340: "The names of those selected as grand jurors by the commissioners shall be written upon a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, 'The list of grand jurors selected at ..... term of the district court,' the blank being for the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court."

Article 344: "Within thirty days of the next term of the district court and not before, the clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal and deliver it to the sheriff."